YEW KIM TAN A

v.

MALLIKA I/K S SUBRAMANIAM & ANOR

COURT OF APPEAL, PUTRAJAYA B
RAUS SHARIF JCA
HASAN LAH JCA
SULONG MATJERAIE JCA
[CIVIL APPEAL NO: B-02-240-03]
28 AUGUST 2009 C

LAND LAW: *Sale of land - Sale and purchase of property - Terms of agreement - Whether failure by defendants to submit application for State Authority's consent to transfer of property to plaintiff within time frame stipulated in agreement amounted to a breach - Whether breach* D *fundamental in nature - Consequences of breach - Whether plaintiff entitled to terminate agreement*

CONTRACT: *Sale and purchase of property - Sale and purchase agreement - Terms - Whether failure by defendants to submit application* E *for State Authority's consent to transfer of property to plaintiff within time frame stipulated in agreement amounted to a breach - Whether breach fundamental in nature - Consequences of breach - Whether plaintiff entitled to terminate agreement*

This was an appeal by the plaintiff against the decision of the F High Court dismissing her originating summons in which the plaintiff sought, *inter alia*, declaratory orders that the defendants had breached the sale and purchase agreement signed between the plaintiff and defendants on 2 July 1997 ('the agreement') and that the plaintiff was entitled to terminate the agreement. Under the G agreement, the defendants agreed to sell to the plaintiff a piece of land together with a double-storey house thereon ('the property'). The plaintiff had been a tenant since December 1996 and was in occupation of the property at the time of the signing of the agreement. Section 4.01(a) of the agreement provided that the H application for the State Authority's consent to the transfer of the property to the plaintiff ('said application') should be made by the defendants within 30 days from the date of the agreement. Section 4.01(c) of the agreement further provided that in the event the said application is rejected or if the approval is not obtained within I six months from the date of the agreement, the agreement shall

A be deemed to have been terminated. The defendants did not submit the said application within the time frame stipulated under s. 4.01(a) of the agreement but, despite the delay, were able to obtain the State Authority's consent within six months as stipulated under s. 4.01(c) of the agreement. The plaintiff
B submitted that the defendants' failure to submit the said application amounted to a breach entitling her to terminate the agreement.

Held (dismissing the appeal with costs)
C **Per Raus Sharif JCA delivering the judgment of the court:**

(1) In this instance, the breach was not a fundamental breach but a subsidiary or minor one which did not give the plaintiff the right to terminate the agreement. While it was true that the said application was made by the defendants outside the 30-
D day time frame as set out in s. 4.01(a), the said consent was nevertheless obtained within the time permitted in s. 4.01(c) of the agreement. The remedy for such minor breaches is damages. However, in the present case, the plaintiff was in
E occupation of the property and, as such, the delay in the submission of the said application would not have any effect on the completion date, especially when the consent was indeed obtained within the six-month period as required under s. 4.01(c) of the agreement. Hence, the plaintiff suffered no
F loss, damages or prejudice due to the defendants' delay in submitting the said application. Since the consequences of the breach were not serious in the sense that they did not go to the root of the agreement, the plaintiff could not treat herself as being free of her obligations under the agreement. For the
G reasons given, the appeal was devoid of merit. (paras 12, 13, 14 & 15)

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh plaintif terhadap keputusan Mahkamah
H Tinggi menolak saman permulaannya di mana plaintif menuntut, antara lain, perintah-perintah perisytiharan bahawa defendan-defendan telah melanggar perjanjian jual beli yang ditandatangani oleh plaintif dan defendan-defendan pada 2 Julai 1997 ('perjanjian tersebut') dan bahawa plaintif berhak menamatkan perjanjian
I tersebut. Di bawah perjanjian tersebut, defendan-defendan bersetuju menjual kepada plaintif sebidang tanah bersama dengan satu rumah bertingkat dua yang terdiri di atasnya ('hartanah

tersebut'). Plaintif merupakan seorang penyewa semenjak Disember 1996 dan adalah penghuni hartanah tersebut pada masa perjanjian itu ditandatangani. Seksyen 4.01(a) perjanjian tersebut menyediakan bahawa permohonan untuk keizinan Pihak Berkuasa Negeri bagi pemindahan hartanah tersebut kepada plaintif ('permohonan tersebut') sepatutnya dibuat oleh defendan-defendan dalam masa 30 hari dari tarikh perjanjian tersebut. Seksyen 4.01(c) perjanjian tersebut lagi menyediakan bahawa jikalau permohonan tersebut ditolak atau jika keizinan tidak diperolehi dalam masa enam bulan dari tarikh perjanjian tersebut, perjanjian itu akan dianggap sebagai telah ditamatkan. Defendan-defendan tidak menyerahkan permohonan tersebut dalam jangka masa yang dipertuntukkan di bawah s. 4.01(a) perjanjian tersebut tetapi, meskipun kelewatan itu, berjaya memperolehi keizinan Pihak Berkuasa Negeri dalam masa enam bulan seperti yang diperuntukkan di bawah s. 4.01(c) perjanjian tersebut. Plaintif menghujah bahawa kegagalan defendan-defendan untuk menyerahkan permohonan tersebut merupakan satu kemungkiran yang memberikannya hak untuk menamatkan perjanjian tersebut.

Diputuskan (menolak rayuan dengan kos)
Oleh Raus Sharif HMR menyampaikan penghakiman mahkamah:

(1) Dalam kes ini, kemungkiran itu bukan suatu kemungkiran asasi tetapi satu kemungkiran subsidiari atau kecil yang tidak memberi plaintif hak untuk menamatkan perjanjian tersebut. Walaupun ia benar bahawa permohonan tersebut dibuat oleh defendan-defendan di luar jangka masa 30 hari seperti yang ditetapkan dalam s. 4.01(a), keizinan tersebut telahpun diperolehi dalam masa yang dibenarkan dalam s. 4.01(c) perjanjian tersebut. Remedi untuk kemungkiran kecil sebegitu adalah ganti rugi. Walau bagaimanapun, dalam kes semasa, plaintif merupakan penghuni hartanah tersebut dan, oleh itu, kelewatan dalam penyerahan permohonan tersebut tidak akan memberi apa-apa kesan pada tarikh kesudahan, terutamanya apabila keizinan tersebut telah sememangnya diperolehi dalam jangka masa enam bulan seperti yang diperuntukkan di bawah s. 4.01(c) perjanjian tersebut. Oleh yang demikian, plaintif tidak mengalami apa-apa kehilangan, kerugian atau prejudis disebabkan kelewatan defendan menyerahkan permohonan tersebut. Oleh kerana akibat-akibat kemungkiran tidak serius

A iaitu tidak membawa kepada punca perjanjian tersebut, plaintif tidak boleh menganggap dirinya bebas dari obligasi-obligasinya di bawah perjanjian tersebut. Bagi sebab-sebab yang diberi, rayuan ini tidak mempunyai merit.

B **Case(s) referred to:**
Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd [1997] 1 CLJ 287 CA ***(refd)***

Legislation referred to:
Probate and Administration Act 1959, s. 60

C *For the appellant - S Ashok (Amarjeet Singh with him); M/s Zubeda & Amarjeet*
For the respondent - J Vicknaraj; M/s Vicknaraj, RD Ratnam, Rajesh Kumar & Assoc

D *[Appeal from High Court, Shah Alam; Originating Summons No: MT2-SP24-951-98]*

Reported by Suresh Nathan

E

JUDGMENT

Raus Sharif JCA:

[1] This is an appeal against the decision of the High Court at
F Shah Alam in dismissing the plaintiff's originating summons.

[2] In the originating summons, the plaintiff had sought against the defendants for declaratory orders *inter alia*:

G (i) that the defendants had breached the sale and purchase agreement signed between the plaintiff and the defendants on 2 July 1997 (the agreement);

(ii) that the plaintiff was entitled to terminate the agreement; and

H (iii) that the defendants were not entitled to forfeit the deposit sum of RM75,500 and accordingly the said sum be refunded to the plaintiff with damages, interest and costs.

[3] Having heard arguments of the parties, we unanimously
I dismissed the appeal with costs. We now give our reasons.

[4] What had happened in this case was this. Under the agreement signed between the plaintiff and the defendants, the plaintiff had agreed to purchase and the defendants have agreed to sell a piece of land under HS(D) 1935 PT1, Jalan 11/2, SEK 11, Bandar Shah Alam, together with a double storey house thereon ("the Property"). At the time of signing of the agreement, the plaintiff was in occupation of the Property. The plaintiff was a tenant since December 1996.

[5] Under the agreement, the sale and purchase of the Property was conditional upon the following:

(i) the approval of the sale by the Court pursuant to s. 60 of the Probate and Administration Act 1959 ("the Act"); and

(ii) the consent of the State Authority to the transfer of the property to the plaintiff.

[6] Section 4.01(a) of the Agreement provided that the application for consent of the State Authority should be made by the defendants within 30 days from the date of the Agreement. Section 4.01(c) of the Agreement further provided that in the event that the application for consent of the State Authority is rejected or if the approval is not obtained within six months from the date of the agreement, it shall be deemed to have been terminated. As the Agreement was dated on 2 July 1997, the application for consent to the State Authority should be made by the defendants on or before 2 August 1997 and the approval must be obtained on or before 2 January 1998.

[7] It was not in dispute that on 19 June 1997, and prior to the execution of the Agreement, the defendants have sought for, and successfully obtained from the High Court at Kuala Lumpur the approval of the sale of the property pursuant to s. 60 of the Act ("the order"). The sealed copy of the order was obtained by the defendants on 21 October 1997.

[8] It was also not in dispute that the defendants did not submit the application for the consent of the State Authority within the time stipulated ie, by 2 August 1997, but instead the application was made on 5 November 1997. Nevertheless, despite the delay in making the application, the defendant was able to obtain the consent of the State Authority within the six months

time as stipulated under section 4.01(c) of the Agreement. The consent of the State Authority was obtained 30 December 1997, ahead of the time stipulated ie, 2 January 1998.

[9] It was submitted by learned counsel for the plaintiff before the learned High Court Judge as well as before this court that the failure of the defendants to submit the application for the consent of the State Authority within the time stipulated under section 4.01(c) of the Agreement amounted to a breach which entitled the plaintiff to terminate the Agreement and the plaintiff had in fact terminated the Agreement by a letter dated 22 December 1997.

[10] The learned High Court Judge addressed the issue in the following manner:

> Setelah menimbangkan permohonan plaintif dan mengambilkira hujah kedua-dua pihak, saya berpendapat seksyen 4.01(a) PJB hendaklah dibaca bersama dengan seksyen 4.01(c) perjanjian tersebut. Kegagalan defendan membuat permohonan dalam masa (30) hari mengikut 40(1)(a) PJB adalah merupakan perlanggaran terhadap terma perjanjian 'subsidiary' sahaja dan tidak menyebabkan PJB tidak dapat diteruskan. Ia bukanlah satu perlanggaran terhadap terma utama atau fundamental. Di dalam kes ini kelulusan pihak Berkuasa Negeri telah diperolehi sebelum tempoh 6 bulan yang dipersetujui di dalam seksyen 4.01(c) tamat.

[11] We are in total agreement with the learned High Court Judge. It is trite law that in every contract, there are some terms that are of fundamental importance and others of less importance. Where the terms that have been flouted is fundamental to the contract, the innocent party is entitled to treat himself as being discharged from further obligation under it. But where the obligation that has been breached is only a subsidiary in nature, the innocent party may not treat himself as being free of his obligation under the contract, although he may sue and recover damages for the non performance of the subsidiary term. (See *Ching Yik Development Sdn. Bhd. v. Setapak Heights Development Sdn. Bhd.* [1997] 1 CLJ 287).

[12] In the present case, it is our view that the breach was not a fundamental breach but a subsidiary or minor breach. Such minor breach do not give rise to the right of the plaintiff to terminate the Agreement. Whilst it is true that the application for the consent of the State Authority was made by the defendants

outside the 30 days time frame as set out in section 4.01(a) the said consent was nevertheless obtained within the time permitted in section 4.01 (c) of the Agreement.

[13] The remedy for such minor breach is damages. However, in the present case, the plaintiff was in occupation of the Property and as such the delay in the submission of the application for the consent of the State Authority, would not have any effect on the completion date. This is especially so when the consent was indeed obtained within the six months period as required under section 4.01 (c) of the Agreement. Hence, the plaintiff suffered no loss, damages or prejudice due to the defendants' delay in submitting the application to the State Authority.

[14] At the end of it, we are of the view that the consequences of the breach complained of by the plaintiff are not serious in the sense that they do not go to the root of the Agreement. Accordingly, the plaintiff cannot treat himself as being free of his obligations under the Agreement.

[15] For the reasons given, we came to the conclusion that the appeal was devoid of merit and accordingly dismissed it with costs. After hearing the parties on costs, we fixed costs at RM5,000 to be paid by the plaintiff to the defendants. The deposit of this appeal was ordered to be paid to the defendants as part of the fixed costs.